Supreme Court, U.S.
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No. 06-1167

In The

Supreme Court of the United States

KEVIN WOODY,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, State of Arizona, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the voluntariness test outlined in *Schneckloth v. Bustamante*, Petitioner may be deemed properly to have consented to testing of his blood and urine after causing a fatal car accident and admitting to police to having ingested illegal drugs the prior day.

2. Whether conditioning a person's driver's license upon the person's submission to blood and urine testing following an accident causing death or serious bodily injury where there is no evidence of impaired driving is an unconstitutional condition.

PARTIES

Petitioner is Kevin Woody. Respondent is the State of Arizona.

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OPINIONS AND ORDERS BELOW

The Arizona Supreme Court's Order denying review is unreported. The Arizona Court of Appeals Memorandum Decision upholding the conviction is also unreported. Unreported as well is the Maricopa County Superior Court Minute Entry denying Petitioner's Motion to Suppress. App. 1, 18, 24.

JURISDICTION

In a May 18, 2006 Memorandum Decision, Arizona Court of Appeals, Division I, affirmed Petitioner's conviction and sentence. App. 1. Arizona's Supreme Court declined Petitioner's timely certiorari petition November 28, 2006. App. 24. The Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "Nor shall any state deprive any

person of life, liberty, or property, without due process of law. . . ."

A.R.S. § 28-673 provides, in relevant part:

> A. A person who operates a motor vehicle within this state gives consent to a test or tests of the person's blood, breath, urine or other bodily substance for the purposes of determining alcohol concentration or drug content if the person is involved in a traffic accident resulting in death or serious physical injury . . . and a law enforcement officer has probable cause to believe that the person caused the accident. . . . C. After a determination is made that a person was involved in a traffic accident resulting in death or serious physical injury . . . and the officer has probable cause to believe that the person caused the accident . . . the person may be requested to submit to and complete any test or tests prescribed by subsection A of this section, and if the person refuses, the person shall be informed that the person's license or permit to drive will be suspended for twelve months. . . .

STATEMENT OF THE CASE

Grave misfortune brings Petitioner before the Court. He stands convicted of vehicular manslaughter because Arizona courts improperly validated his purported consent to blood and urine tests. Such admission violated the Fourth Amendment's prohibition of unreasonable searches made applicable to the states through the Fourteenth Amendment's Due Process Clause. His case presents the Court a unique opportunity to explicate the subjective aspects of the voluntariness test adopted in *Schneckloth v. Bustamante,* 412 U.S. 218 (1973). *Schneckloth* provides that

voluntariness of consent be judged according to the totality of the circumstances surrounding the consent, including both objective considerations and factors subjective to the individuals sought to be questioned or searched. However, for various reasons discussed below, courts subsequently applying *Schneckloth* have focused upon objective factors to determine consent while underanalyzing, ignoring or objectifying subjective factors informing the analysis. Accordingly, courts apply *Schneckloth* in contradictory ways that undermine both due process and the rule of law.

Petitioner's case affords a useful basis for the Court to reconsider and possibly reform *Schneckloth*'s subjectivity requirement because subjective considerations largely inform the question of Petitioner's consent. Imagine: you have just accidentally killed a young man with a truck and admit to investigating officers at the scene to having ingested marijuana, methamphetamines and prescription painkillers the day before. Notwithstanding these admissions, the police, incredibly, do not take you into custody. Instead, they put you through a battery of field sobriety tests, which you pass, and then invite you to the station for further testing. They say nothing about your right to leave or to refuse. Would you feel free to leave? Would you feel free to decline testing? Within the totality of the circumstances, Petitioner clearly and reasonably could feel neither free to leave nor to withhold his consent to any requests the police made.

Because *Schneckloth* remains the original source of consent jurisprudence, the subjective aspects of its consent calculus deserve more explicit definition. Clarifying the subjectivity inquiry will bring greater coherence to *Schneckloth*'s application in lower courts and will afford law enforcement better guidance in consent searches.

Additionally, this case provides the Court an opportunity to examine the constitutionality of the implied consent statute used to secure Petitioner's compliance in testing. A.R.S. § 28-673, the statute at issue, provides that drivers imply consent to bodily fluid testing if they are involved in traffic accidents resulting in another's death or serious bodily injury, and there is probable cause they caused the accident. Drivers refusing testing forfeit their licenses for at least a year. The problem with the statute is that it requires only probable cause to believe the drivers were involved in the accident, not evidence that they caused it or that they were driving impaired. Because there is no nexus between the testing sought and responsibility or impairment, this requirement unconstitutionally conditions the drivers' Fourth Amendment rights against unreasonable searches and seizures upon the government benefit of driving licensure. Accordingly, using it to induce Petitioner's submission to testing was unconstitutional.

Facts in Petitioner's case

On May 16, 2003, at 3:14 p.m., Petitioner struck and killed Robert Corliss while driving his pick-up truck through the stop sign and crosswalk of an intersection in Peoria, Arizona. Petitioner was traveling at about 45 mph in a 30 mph zone. Mr. Corliss went by helicopter to a nearby hospital but died while Petitioner was still at the scene. Peoria police (Officers Gary Coulter and Samuel Karaloff) responded and contacted Petitioner, who was validly licensed and purportedly agreed to answer questions. During questioning, Petitioner admitted to the officers he had ingested marijuana, methamphetamines and a prescribed pain medication the prior day. He denied feeling any effects from the drugs but later acknowledged that perhaps he should not have been driving while on

"medication and meth." Petitioner further stated he had been concentrating on eating food in the vehicle and was stressfully preoccupied by personal concerns when the accident occurred. Officer Karaloff asked Petitioner to submit to various field sobriety tests (FSTs), which Petitioner passed. During an evidentiary hearing, Officer Coulter testified that Petitioner was not under arrest, no probable cause supported arrest, and he was "free to leave" before and after administration of the FSTs. App. 2, 4

Notwithstanding this, and despite conceding at a later suppression hearing they believed they had no probable cause to arrest Petitioner, the Officers asked Petitioner to accompany them to the police station for a drug recognition exam (DRE). App. 4.

After arriving at the station, the Officers asked Petitioner for blood and urine samples, handing him a "Consent to Search" form. As Petitioner read the form, he asked to telephone a lawyer. Officer Karaloff advised that he could. Petitioner opted to do so, but, after five minutes, reported he was unable to reach an attorney. When Officer Karaloff then asked Petitioner if he wanted to leave a message and call-back number, Petitioner replied, "Nah, I don't need to, I'll take the test." App. 4.

However, prior to testing, Petitioner asked if his license would be suspended if he did not take the test. Officer Karaloff responded that he was asking Petitioner to consent to testing and handed him a copy of A.R.S. § 28-673, advising him that this was the law regarding traffic accidents. That statute permits police to request blood, breath and urine samples from motorists they have probable cause to believe were involved in fatal or serious injury traffic accidents. The penalty for motorists refusing such tests is a year's license suspension. Officer Coulter

advised he review subsection (C), which provides for the license suspension of motorists refusing testing. Petitioner appeared to read the statute briefly, replied "okay," signed the consent form and provided specimens. Thereafter, Officer Karaloff conducted the DRE while Officer Coulter, his DRE trainer, observed. App. 4.

State analysis of Petitioner's blood and urine showed active methamphetamine metabolites and inactive marijuana metabolites. Prosecution followed. App. 2.

Petitioner, pursuant to the Fourth and Fourteenth Amendments of the U.S. Constitution, moved pretrial for dismissal and evidence suppression, alleging, *inter alia*, no consent and A.R.S. § 28-673's unconstitutionality. App. 26-28. Concluding he had consented and that the statute was constitutional, the trial court denied the motion on October 25, 2004:

> Defendant asks this Court to declare ARS 28-673 unconstitutional because it authorizes searches without probable cause to believe the driver was impaired. Defendant's claim is belied by the language of the statute, which expressly mandates probable cause to believe the driver caused the accident. This Court finds the probable cause requirement reasonable under the Sixth Amendment. . . . The law does not require police to advise a subject being asked for consent that they have a right to refuse consent. The law does not preclude trickery to induce consent. Defendant consented to provide a sample of his blood and urine. . . .

App. 21-22.

Following a bench trial Maricopa County Superior Court convicted Petitioner of Manslaughter and sentenced

him to imprisonment. App. 2. On March 4, 2005, the Court sentenced Petitioner to a mitigated term of nine years' imprisonment. Petitioner timely appealed, and again raised the consent and A.R.S. § 28-673 issues, arguing the Fourth and Fourteenth Amendments and relying upon several federal precedents, including *Bumper v. North Carolina*, 391 U.S. 543 (1968) and *Schneckloth v. Bustamante*, 412 U.S. 218 (1973). App. 32-41.

In a May 18, 2006 Memorandum Decision, Arizona Court of Appeals, Division I, affirmed Petitioner's conviction and sentence, holding, *inter alia*, that Petitioner voluntarily, freely and expressly consented to the tests and, citing federal precedents, that A.R.S. § 28-673 was constitutional. ("Woody voluntarily and freely consented to furnish a urine and blood sample. . . . Mere imposition of the penalty of license suspension for refusal to consent does not rob consent of its voluntariness"). App. 7, 9.

Petitioner timely sought certiorari from Arizona's Supreme Court, making the same arguments regarding consent and A.R.S. § 28-673. App. 36-41. The Court declined to hear the case November 28, 2006. App. 24.

REASONS FOR GRANTING THE PETITION

I. PETITIONER'S CONSENT WAS NOT VALID BECAUSE PETITIONER DID NOT VOLUNTARILY CONSENT TO BLOOD AND URINE TESTING.

The recent history of the Court's consensual search jurisprudence demonstrates a movement away from

subjective considerations towards objective ones.[1] This is hardly surprising, given that "[t]he touchstone of the Fourth Amendment is reasonableness." *Jimeno*, 500 U.S. at 250 (*citing Katz v. U.S.*, 389 U.S. 347, 360 (1967)). Other aspects of the Court's Fourth Amendment jurisprudence have moved towards reasonableness as well. Objective tests are highly desirable as ready guides to police seeking to make sound cases and courts to make sound judgments. *See, e.g., Brigham City v. Stuart*, 126 S.Ct. 1943, 1948 (2006) (rejecting consideration of officers' subjective intent in evaluating reasonableness of their invocation of emergency aid doctrine exception to the warrant requirement). Objective tests also vindicate rule of law concerns by promoting predictability within a criminal justice system besieged constantly by claims of unfair prosecution based upon subjective factors such as race and class.

Those strengths of objective factors, coupled with the analytically blunted quality of the statement of the subjective factor test in *Schneckloth,* have also contributed to increasing emphasis upon objective factors in consensual searches. *Schneckloih* held that courts ascertaining

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[1] *U.S. v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *Colorado v. Connelly*, 479 U.S. 157 (1986); *Michigan v. Chesternut*, 468 U.S. 567 (1988); *Florida v. Jimeno*, 500 U.S. 248 (1991); *Florida v. Bostick*, 501 U.S. 429 (1991); *Ohio v. Robinette*, 519 U.S. 33 (1996); *U.S. v. Drayton*, 536 U.S. 194 (2002). *See also* Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2188-2194 (2006); Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 779-84 (2005). Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 212-36 (2002). Strauss' and Simmons' work has been invaluable in guiding the analysis presented here.

whether or not a suspect voluntarily consents to police questioning or searching must consider the totality of circumstances informing the situation. *Schneckloth*, 412 U.S. at 233 ("Rather it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches."). The Court established the subjectivity requirement as a counterpoint to objectivity in the totality of the circumstances context. *Schneckloth*, 412 U.S. at 226 ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances – both the characteristics of the accused and the details of interrogation."). Subjective factors to be considered included defendant's youth, lack of education, low intelligence, lack of advice regarding constitutional rights, length of detention, the repeated and prolonged quality of questioning and use of physical punishment (food or sleep deprivation). *Id.* at 226 (citations omitted).

Schneckloth's totality test has proven inadequate because the Court framed it too extremely.

> There is obviously an enormous middle ground between a "free and unconstrained choice" and a person's will being "overborne." . . . Between the two points – times when a defendant's choice is not entirely free and unconstrained and yet his will is not completely overborne – falls almost every interaction between law enforcement officials and suspects.
>
> Schneckloth ducks this difficult analytical issue, since it does not make any further inquiry

> about where the line should be set between these two disparate points. Instead, it produces a test by simply adopting one of those points without further analysis and proceeding to apply it to the case at hand, asking whether the defendant's "will has been overborne and his capacity for self-determination critically impaired."

Simmons at 787 (footnotes omitted).[2]

Ignoring the middle exposed *Schneckloth*'s test to development within the seizure context and its objective criteria regarding a reasonable person's estimation of freedom to leave. *See* Simmons at 777-78. Eventually, in cases concerning seizures and alleged consent searches, the Court, "instead of conducting separate analyses for the seizure and the consent . . . simply used one test – the Fourth Amendment test for seizure – without even considering the separate question of voluntary consent." Simmons at 778 (footnote omitted). The comparative beauty of the objective "free to leave standard" lies in its levelling effect of suspects' varying perceptions of the reasonableness of their police encounters.

> The test's objective standard – looking to the reasonable man's interpretation of the conduct in question-allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment . . . This 'reasonable person' standard also ensures that the scope of the Fourth Amendment protection does

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[2] "Moreover, the vagueness of the test itself, and the amorphous description of the meaning of voluntariness likely causes the court to shy away from considering objective factors. Talismanic phrases like 'ensuring a person's uncoerced choice' provide little assistance." Strauss at 228.

> not vary with the state of mind of the particular individual being approached.

Michigan v. Chesternut, 486 U.S. 567, 574 (internal citation omitted) (adopting objective reasonable person/free to leave standard for evaluating whether a seizure has occurred for Fourth Amendment purposes).

Defendants' subjective impressions of whether or not they have been seized do not matter in the objective context. Accordingly, merging the objective seizure analysis with the totality of the circumstances consent/voluntariness inquiry has rendered increasingly irrelevant the latter's subjective components.

Not suprisingly, the subjectivity test's fortunes have faded and unpredictability has reigned among courts applying *Schneckloth*'s voluntariness test. Strauss at 221-35. As early as 1993, the U.S. Court of Appeals for the Tenth Circuit questioned its continued validity. *U.S. v. Zapata*, 997 F.2d 751, 759 (10th Cir. 1993) ("While '[a] person's subjective characteristics may be relevant to the voluntariness of the person's consent . . . recent Supreme Court decisions cast doubt on this issue.'") (*quoting U.S. v. Bloom*, 957 F.2d 1447, 1450 (10th Cir. 1992), *overruled on other grounds, U.S. v. Little*, 18 F.3d 1499, 1503 (10th Cir. 1994)). The Second Circuit essentially vindicated that observation by reconfiguring *Schneckloth*'s test as a purely objective test from the perspective of the officer, not the suspect. *See U.S. v. Isiofia*, 370 F.3d 226, 231 (2d Cir. 2004) (*quoting U.S. v. Garcia*, 56 F.3d 418, 423 (2d Cir. 1995) ("[T]he ultimate question presented is whether the officer had a reasonable basis for believing that there had been consent to search.") (internal quotations and citation omitted). Seeking to have and eat the cake, the Second

Circuit declares in *Garcia* that the objective test still permits subjective considerations under the totality of the circumstances: "[T]his objective standard does not preclude an assessment of the particularities of the situation that is presented in any given case. On the contrary, it is still the totality of the circumstances that must be considered. . . ." *Garcia*, 56 F.3d at 423 (*citing U.S. v. Sanchez*, 32 F.2d 1330, 1335-36 (8th Cir. 1994)).

Other circuits have adopted implicitly the same approach. *See U.S. v. Ledesma*, 447 F.3d 1307 (10th Cir. 2006), which, in a traffic stop context, formulated the consent inquiry as one of totality of the circumstances pursuant to *Schneckloth,* having as its central question "whether 'a reasonable person would believe he was free to leave or disregard the officer's request.'" *Ledesma*, 447 U.S. at 1314 (*quoting Schneckloth* at 248-49; *U.S. v. Manjarrez*, 348 F.3d 881, 885-86 (10th Cir. 1992)). Similarly, the Eighth Circuit applied an objective standard cloaked in *Schneckloth*'s authority to find consent in a traffic stop. *U.S. v. Cedano-Medina*, 366 F.3d 682 (8th Cir. 2004) (*quoting Schneckloth* at 248) ("We do not think that it would have been reasonable to believe that Mr. Cedano-Medina understood that he was free to leave the scene instead of entertaining Trooper Roby's questions about searching the truck. . . . [The government] only needed to prove that it was reasonable to believe that the consent was not the result of 'duress or coercion, express or implied. . . .'"). The Ninth Circuit, in *U.S. v. Patayan-Soriano*, 361 F.3d 494 (2004), reasoned similarly when, citing precedent relying upon *Schneckloth*, it judged a suspect's fears the police would take her children away for not consenting according to a reasonableness standard within the circumstantial totality of the officers' conduct.

Patayan-Soriano, 361 F.3d at 502 (*citing and quoting U.S. v. Castrillon*, 716 F.2d 1279, 1283 n.1 (9th Cir. 1983) ("Specifically, the court must determine whether 'a person in [suspect's] position would reasonably have feared' her children being taken into custody in light of the officers' conduct.").

Perhaps more disturbing, however, is the fact that many federal courts appear to ignore the subjective factor inquiry altogether. *See* Brian A. Sutherland, Note, *Whether Consent to Search was Given Voluntarily: A Statistical Analysis of Factors that Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L.REV. 2192 (2006). In his study, Mr. Sutherland surveyed statistically 142 federal district court decisions issued between January 1, 2004, and May 18, 2006, to determine what reasons courts most cited in finding searches consensual. Sutherland at 2203-25. He found that "[f]actors relating to the individual traits of the defendant received relatively little discussion in the district courts' rulings. In fact, the district court did not review any of the subjective aspects of the defendant in 94 of the 142 cases in the sample." Sutherland at 2215.[3]

[3] Little better is the practice many courts employ of simply citing the relevant test and then conducting no explicit subjective factor analysis. *See* Strauss at 222 ("In researching this paper, I started by reading every published consent case in the last three years at both the federal and state level. I was looking to see how the lower courts analyzed the various subjective factors in determining whether there was viable consent. In case after case, I found that the court simply recited a paragraph on what constituted voluntariness and on the state's burden to demonstrate that the consent was voluntary. I discovered only a handful of cases out of hundreds of decisions – in which the court analyzed the suspect's particular subjective factors.") (footnote omitted).

The Road to Objectivity

How did we get here? Review of the Court's most recent *Schneckloth* progeny provides some explanation. In *U.S. v. Drayton*, 536 U.S. 194 (2002), the Court held admissible drugs defendants revealed during a purportedly consensual search after police boarded the bus defendants were travelling on and asked to search them and their luggage. *Drayton*, 536 U.S. at 205-08. The Court first conducted a seizure analysis under the objective, reasonable person standard: "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *Drayton* at 201. It formulated this standard 11 years before in *Florida v. Bostick*, 501 U.S. 429 (1991), which found bus passengers subjected to similar police action were not "seized" for Fourth Amendment purposes. It concluded a reasonable person in defendants' situation would feel free to terminate the encounter with the police based upon the following facts: (1) The officers gave passengers no indication the passengers were required to answer questions; (2) When the officer discovering the drugs approached defendants, he did not brandish a weapon or make intimidating movements; and, (3) The officer left the aisle free so that defendants could exit and addressed them individually in a quiet, polite voice. *Drayton* at 203-04.

Turning to the consent question, the Court cited similar factors in finding defendants acted voluntarily (officer's non-commanding tactics and request for permission prior to conducting the search). *Drayton* at 206. Indeed, the Court even noted that "[i]n circumstances such as these, where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts." *Drayton* at 206. The

only meaningful difference between the analyses is that, in assessing voluntariness, the Court invoked *Schneckloth*'s totality of the circumstances test and found that the officers' failure to advise respondents (as the officers in *Bostick* had) of their right to refuse did not vitiate their consent. *Drayton* at 206-07 (*citing Schneckloth*).

Dissenting, Justice Souter observed that the majority improperly considered the consent search issue and noted the objectivity/subjectivity problem created by its decision to do so. *Drayton* at 209 (Souter, J., dissenting). Arguing that the circuit court analyzed the case objectively pursuant to *Bostick*'s seizure standard, Justice Souter observed

> [t]here is thus no occasion here to reach any issue of consent untainted by seizure. If there were, the consent would have to satisfy the voluntariness test of *Schneckloth* . . . which focuses on "the nature of a person's subjective understanding" . . . and requires consideration of "the characteristics of the accused [in addition to] the details of the interrogation. . . ."

Drayton at 209 (Souter, J., dissenting) (internal citations omitted).

Accordingly, *Drayton* represents movement "from a subjective binary test that focuses on whether or not the subject acted voluntarily, to a more nuanced objective test that focuses on the amount of compulsion used by the law enforcement officer." Simmons at 775.[4] Simmons remarks

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[4] *Drayton* also "implicitly adopted the same 'free to leave/terminate' test for deciding voluntariness of consent to search that has been used since *Bostick* for deciding the seizure question. These two questions – seizure and voluntariness of search – have essentially merged in *Bostick* and *Drayton*. The *Schneckloth* Court's emphasis on balancing

(Continued on following page)

frankly that "[i]t is an open secret that the subjectivity requirement of *Schenckloth* is dead." Simmons at 779.

Drayton culminates a movement towards objectivity in consent jurisprudence that has proceeded steadily, if incrementally, for many years. *See* Simmons at 779-85. *U.S. v. Mendenhall*, 466 U.S. 544 (1980), analyzed consent within a seizure context, finding that a person has been seized for Fourth Amendment purposes "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 466 U.S. at 554 (footnote omitted). This formulation merges objective and subjective considerations (reasonable person, totality of the circumstances) in a manner later precedents adopt. Moreover, *Mendenhall* also winnows the subjective nature of *Schneckloth*'s inquiry by distinguishing voluntariness from self-interest: "It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily." *Mendenhall*, 466 U.S. at 555-56. *Florida v. Royer*, 460 U.S. 491, 519 n.4 (1983), qualified the reasonable person's identity by requiring he or she be innocent. *See Florida v. Bostick*, 501 U.S. 429, 438 (1991) (*citing Royer*).

Eight years after *Mendenhall*, the Court ratified the "free to leave" test's purported objectivity in *Michigan v. Chesternut*, 486 U.S. at 573-74, noting that "[t]he test's objective standard-looking to the reasonable man's interpretation of

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order and liberty has receded into the background." Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 162 (2002).

the conduct in question- – allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Chesternut*, 486 U.S. at 574 (citation omitted). *Florida v. Jimeno*, 500 U.S. 248, continued the trend, formulating the consent inquiry in a manner suggesting complete objectivity:

> [W]e have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so.... The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?

Jimeno, 500 U.S. at 250-51 (*citing Schneckloth* at 219; *Illinois v. Rodriguez*, 497 U.S. 177, 183-89 (1990); *Royer* at 501-02, 514, 103 S.Ct. 1319, 1332).

Objectification of otherwise subjective considerations, such as a suspect's fear and intelligence, also transpired. In *I.N.S. v. Delgado*, 466 U.S. 210, 220-21 (1984), the Court found no seizure occurred when immigration authorities canvassing factory workers in search of illegal immigrants manned the factory's exits during the sweep. The holding is based partially upon the qualification of whether workers' fears of confrontation with I.N.S. agents were reasonable:

> The presence of agents by the exits posed no reasonable threat of detention to these workers while they walked throughout the factories on job assignments. Likewise, the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in

> any reasonable apprehension by any of them that they would be seized or detained in any meaningful way. Since most workers could have had no reasonable fear that they would be detained upon leaving, we conclude that the work forces as a whole were not seized.

Delgado, 466 U.S. at 219 (footnote omitted).

Delgado figures prominently in both *Bostick* and *Drayton*. *See Bostick*, 501 U.S. at 436-37; *Drayton*, 536 U.S. at 204-05.

Thereafter, *Colorado v. Connelly*, 479 U.S. 157, 166 (1986), provided that voluntariness in the custodial interrogation context depended not on whether the confessor was "totally rational and properly motivated" but rather on whether or not police coerced the confession. There, the Court held admissible an insane suspect's confession because it occured after police Mirandized him and absent coercive state action. *Connelly*, 479 U.S. at 166. Moreover, the Court cited another objective consideration, arguably informing at least implicitly all of these cases, that of deterrence of constitutional violations: "The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." *Connelly*, 479 U.S. at 166 (*citing U.S. v. Leon*, 468 U.S. 897, 906-13 (1984)). While this discussion is hardly exhaustive,[5] it illustrates why lower courts fail consistently to apply (and to apply consistently) *Schneckloth*'s voluntariness test.

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[5] Simmons provides more detailed analysis. *See* Simmons at 779-85.

Subjectivity in Petitioner's Case

Petitioner's case offers a substantial opportunity for reviving the subjective component of *Schneckloth*'s test because its facts present clear questions of voluntariness within the seizure context. Here, notwithstanding admissions to speeding and distracted driving in the wake of illegal drug use, police maintained that Petitioner was free to leave and that his ongoing participation in the investigation was voluntary.

At least three U.S. Courts of Appeal arguably would contest that conclusion. The Tenth Circuit most clearly stated the issue in *U.S. v. Turner*, 928 F.2d 956 (1991). There, it found consensual a search following a traffic stop because the officer, who asked the suspect whether he possessed drugs and weapons, did so while returning the suspect's license and registration. *Turner*, 928 F.3d at 959. "[I]f the officer returns the driver's license, a driver is illegally detained only if the driver 'has an objective reason to believe that he was not free to end his conversation with the law enforcement official and proceed on his way.'" *Turner*, 928 F.3d at 959 (*quoting U.S. v. Werking*, 915 F.2d 1404, 1408 (10th Cir. 1990)).

Similarly, in *U.S. v. Arias-Robles*, ___ F.3d ___, 2007 WL 188723 (5th Cir. 2007), the Fifth Circuit found a truck driver was free to leave for purposes of determining whether a consensual search occurred despite the fact the officer had questioned him about his criminal record and whether any illegal items were in his truck. *Arias-Robles* at *2. Crucial to the Court's decision, however, was the fact the officer told defendant he could leave:

> [T]he district court found that Arias's custodial status was voluntary when O'Donnell requested

> consent because O'Donnell had told him he was "free to go" and returned his belongings. Arias counters that a reasonable person wouldn't have felt free to go in light of O'Donnell's immediately prior queries about Arias's criminal past and illegal items in the truck. Our precedent supports the district court's finding that Arias, being told he was "free to go," was voluntarily present when O'Donnell requested consent.

Arias-Robles at *2 (*citing U.S. v. Sanchez-Pena*, 336 F.3d 431, 443 (5th Cir. 2003); *U.S. v. Brigham*, 382 F.3d 500, 508 (5th Cir. 2004)).

The Fifth Circuit's circumstantial totality consent test reflects the same sentiment regarding freedom to leave as judged from a potentially guilty suspect's point of view. It requires considering

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

U.S. v. Valentine, 401 F.3d 609, 613 (5th Cir. 2005) (*citing U.S. v. Tompkins*, 130 F.3d 117, 121 (5th Cir. 1997)).

The Eleventh Circuit employs a similar consent inquiry:

> "In assessing voluntariness, the inquiry is factual and depends on the totality of the circumstances. . . . In evaluating the totality of the circumstances underlying consent, the court should look at several indicators, including the

> presence of coercive police procedures, the extent of defendant's cooperation with the officer, the defendant's awareness of his right to refuse consent, the defendant's education and intelligence, and the defendant's belief that no incriminating evidence will be found."

U.S. v. Simms, 385 F.3d 1347, 1355 (11th Cir. 2004) (*quoting U.S. v. Purcell*, 236 F.3d 1274, 1281 (11th Cir. 2001)) (consent to search valid in traffic stop context).

Here, Petitioner had a clear and objective basis for surmising he was not free to leave. He had just committed manslaughter, admitted to illegal drug use to Officers at the scene. The Officers also kept him at the scene for over two hours of questioning and field sobriety testing. His de facto custodial status, coupled with the situation's emotionally overwhelming circumstances, clearly belie any notion he voluntarily consented to testing.

Petitioner therefore respectfully requests the Court grant certiorari and reverse the lower courts. Doing so will provide the Court opportunity to help guide development of subjective considerations informing consent questions, particularly how they should be judged relation to objective seizure contexts.[6] Such guidance is sorely needed, as the discussion above demonstrates.

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[6] Amplifying this issue's importance is the fact that the state must prove voluntary consent. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.") (footnotes omitted).

II. FORCING PETITIONER TO CHOOSE BETWEEN HIS DRIVER'S LICENSE AND FOURTH AMENDMENT RIGHTS ABSENT EVIDENCE OF IMPAIRED DRIVING VIOLATES THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

Another worthy issue Petitioner's case presents concerns the unconstitutional conditions doctrine. As noted above, the Officers compelled Petitioner to choose between his driver's license and Fourth Amendment rights against unreasonable searches and seizures by brandishing A.R.S. § 28-673 to justify taking Petitioner's blood and urine. That statute implies consent to such testing for drivers probable cause indicates caused auto accidents resulting in death or serious bodily injury. A.R.S. § 28-673(A). It requires no showing of impaired driving and penalizes refusal of testing with license suspensions of at least a year. A.R.S. § 28-673(A), (C).

The lack of nexus between impairment and testing violates the unconstitutional conditions doctrine. That doctrine provides the government may not require people to forefeit constitutional rights in exchange for government benefits or privileges. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S.Ct. 1297, 1306-07 (2006) (*quoting Board of Comm'rs, Wabaunsee Cty. v. Umbehr,* 518 U.S. 668, 674 (1996) (internal quotation marks omitted) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit."); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (citations omitted) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional

right-here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or not relationship to the property."); *Western and Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. 648, 657-58 (1981) (citations omitted) ("[A] State may not impose unconstitutional conditions on the grant of a privilege.").

Because A.R.S. § 28-673 requires showing no impairment before license revocation, it lacks the logical nexus that might otherwise justify the measure and therefore violates due process. *See, e.g., Turner v. Department of Public Safety*, 350 So.2d 984, 987-88 (La. App. 1977) (reversing license suspension where administrative record lacked any evidence of impaired driving). Moreover, while Indiana's Court of Appeals upheld a similar statute justifying testing of drivers involved in serious accidents absent evidence of impairment, its analysis does little to inform the question here because it neither engages in meaningful, constitutional analysis nor does it consider unconstitutional conditions. *See Griswold v. State*, 725 N.E.2d 416, 417-20 (Ind. App. 2000).

The Officers' use of A.R.S. § 28-673 to induce Petitioner's submission to blood and urine testing raises serious unconstitutional conditions questions that, coupled with the consent issues addressed above, offer further reason the Court should hear Petitioner's case.

CONCLUSION

Petitioner respectfully requests the Court grant his writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. KEVIN CLAY WOODY, Appellant.	)	1 CA-CR 05-0412 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2003-021776-001 DT

The Honorable Warren J. Granville, Judge

AFFIRMED

(Filed May 18, 2006)

Terry Goddard, Attorney General Phoenix
By Randall M. Howe, Chief Counsel,
Criminal Appeals Section
and Cassie Bray Woo, Assistant Attorney General
Attorneys for Appellee

Law Offices of David Michael Cantor, P.C. Phoenix
By David M. Cantor
Todd E. Nolan
Attorneys for Appellant

IRVINE, Presiding Judge

¶1 Defendant Kevin Clay Woody ("Woody") appeals his conviction for reckless manslaughter. For the reasons that follow, we affirm.

¶2 Woody raises two issues on appeal: 1) Does Arizona Revised Statutes ("A.R.S.") section 28-673 (2001) violate his right to be free from unreasonable searches and seizures, and his due process rights on grounds of vagueness or overbreadth? 2) Were the drug recognition observations and opinions of an uncertified officer inadmissible due to lack of general acceptance in the scientific community and for lack of foundation?

FACTS AND PROCEDURAL HISTORY

¶3 Woody waived the right to a jury trial and stipulated to a trial by submission of reports to the court. The trial court found the evidence showed that Woody ran a stop sign on May 16, 2003, at about 3 p.m., and hit and killed a thirteen-year-old boy who had been walking in a marked crosswalk. Woody was traveling at least fifteen miles in excess of the speed limit at the time of the collision. Woody admitted to police that he had been eating chicken wings, and was distracted. Woody also admitted that he had smoked marijuana and ingested methamphetamine within the past twenty-four hours, and had taken a prescribed pain killer the night before. A toxicologist opined that Woody was impaired by methamphetamine at the time of the collision. The trial court found Woody guilty of reckless manslaughter, based on his excessive speed, failure to stop at a stop sign near a school zone when students were being let out, ingestion of drugs that impaired his judgment and ability to drive, and distraction by eating food.

¶4 The trial court sentenced Woody to a mitigated term of nine years in prison. Woody filed a timely notice of appeal. We have jurisdiction under Article 6, Section 9 of

the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A) (2001).

¶5 Woody argues first that A.R.S. § 28-673 violates his right to be free from unreasonable searches and seizures, as well as his right to due process, because it is overbroad and vague. That statute provides that a driver impliedly consents to testing of his blood, breath, urine or other bodily substance for the presence of drugs or alcohol if police have probable cause to believe that he caused a traffic accident resulting in serious injury or death. A.R.S. § 28-673(A). The statute further states that if the person refuses a police request to submit to such testing, the person's driver's license will be suspended for twelve months, but police may not draw his blood in the absence of a draw for medical purposes or a search warrant. A.R.S. § 28-673(C) and (D). Under the statute, "failure to expressly agree to the test[ing] . . . is deemed a refusal." A.R.S. § 28-673(C).

¶6 Woody moved to dismiss the indictment before trial on the ground that A.R.S. § 28-673 is unconstitutional, because it permits police to obtain blood in the absence of any indication that the person was impaired by alcohol or drugs, permits arbitrary and discriminatory enforcement, and is overbroad because it violates the "right to privacy without an important purpose." The State argued that A.R.S. § 28-673 simply imposes a condition on the privilege of driving and does not authorize an unreasonable search or seizure, is not vague because it requires probable cause to believe a person caused a fatal or serious injury accident, and does not implicate any privacy interests because the driver has previously consented to the intrusion.

¶7 At an evidentiary hearing, police testified that Woody consented verbally and in writing to blood and urine testing, after attempting without success to reach an attorney and after reviewing a copy of A.R.S. § 28-673 supplied in response to his question as to whether his license would be suspended if he refused. At that time, police had information that Woody had run a stop sign and struck and killed a boy walking in the crosswalk. Police did not believe they had probable cause to arrest Woody, and advised him that he was not under arrest. Officer Patrick Samuel Karaloff testified that he asked Woody if he would voluntarily take a blood and urine test, and he handed Woody a "consent to search" form. While Woody was reading the form, Officer Karaloff informed him that he could use the telephone to consult with an attorney. Woody took five minutes to make a call and subsequently told the officer he was unable to reach the attorney. When the officer asked him if he wanted to leave a message and a call back number, Woody replied, "Nah, I don't need to, I'll take the test." Woody then asked if his license would be suspended if he did not take the test. The officer informed Woody that he was asking if Woody would give his consent to such testing, and handed him a copy of A.R.S. § 28-673, advising him that this was the law pertaining to traffic accidents. Officer Gary Coulter testified that Woody was directed to section (C) of the statute, which provides that a person's driver's license will be suspended for twelve months if he refuses to provide samples. Woody appeared to read the statute for a minute, replied "okay," and signed the consent to search form.

¶8 The trial court denied Woody's motion to dismiss, ruling that A.R.S. § 28-673's requirement that police have probable cause to believe that the person caused the

accident satisfies the constitutional prohibition against unreasonable searches and seizures. The trial court further found that A.R.S. § 28-673(C), which imposes license suspension as a penalty for refusing to provide a urine or blood sample, was never triggered because Woody consented to provide the blood and urine samples. The trial court found alternatively that probable cause existed to believe that Woody had caused the accident by running a stop sign and hitting a pedestrian in a marked crosswalk. Finally, the trial court found that the police acted in good faith.

DISCUSSION

¶9 "We review the trial court's ruling on a motion to dismiss for abuse of discretion." *State v. Moody,* 208 Ariz. 424, 448, ¶ 75, 94 P.3d 1119, 1143 (2004). "[W]e presume that the court was aware of the relevant law and applied it correctly in arriving at its ruling, and we can affirm the ruling on any basis supported by the record." *Id.* at 449, ¶ 81, 94 P.3d at 1144 (citations omitted). We review the trial court's ruling on the constitutionality of a statute de novo. *State v. Carrasco,* 201 Ariz. 220, 223, ¶ 10, 33 P.3d 791, 794 (App. 2001). We "construe the statute to give it a constitutional meaning" if possible. *State v. Poshka,* 210 Ariz. 218, 219, ¶ 3, 109 P.3d 113, 114 (App. 2005). We additionally presume that the statute is constitutional and Woody has the burden of overcoming this presumption. *Carrasco,* 201 Ariz. at 223, ¶ 10, 33 P.3d at 794; *see Bird v. State*, 184 Ariz. 198, 203, 908 P.2d 12, 17 (App. 1995).

¶10 Before considering the facial constitutionality of a statute, we consider whether Woody has standing to challenge its constitutionality. *State v. Musser*, 194 Ariz.

31, 32, ¶ 5, 977 P.2d 131, 132 (1999) (explaining that the standing principle "reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws"). In order to have standing to raise a constitutional challenge, Woody "must himself have suffered some threatened or actual injury resulting from the putatively illegal action." *State v. Herrera,* 121 Ariz. 12, 15, 588 P.2d 305, 308 (1978) (internal citations and quotations omitted) (rejecting Eighth Amendment challenge to a statute imposing a maximum life sentence from a defendant who faced only a five-to-ten-year prison term.); *see Musser*, 194 Ariz. at 32-33, ¶¶ 5-7, 977 P.2d at 132-33 (rejecting an overbreadth challenge from a defendant whose conduct admittedly was not constitutionally protected).

¶11 The trial court found that Woody had consented to give a urine and blood sample, and as a result, did not trigger the penalty imposed by A.R.S. § 28-673 for refusing to provide a sample. The record thus allows us to affirm the trial court's ruling because Woody lacks standing, despite the State's failure to raise the issue in the trial court. *See Moody,* 208 Ariz. at 449, ¶ 81, 94 P.3d at 1144. *Cf., State v. B Bar Enter., Inc.,* 133 Ariz. 99, 101 n.2, 649 P.2d 978, 980 n.2 (1982) (expressing concern over the lack of standing, but addressing the merits because standing is only a rule of judicial restraint, not a jurisdictional requirement, and the state failed to raise standing on appeal); *State v. Hazlett,* 205 Ariz. 523, 527, ¶ 5, 73 P.3d 1258, 1262 (App. 2003) (holding that State waived the standing challenge by failing to raise the issue below and failing to make the necessary record to show lack of standing).

¶12 In this case, the evidence shows that Woody expressly consented to the police request for urine and blood samples freely and voluntarily under the totality of the circumstances, as required for validity. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 248-49 (1973). The record fails to offer any support for Woody's argument in his reply that the officers coerced Woody into consenting to provide urine and blood samples by asserting that they had statutory authority to obtain the samples. The officers testified that they did not read the standard "implied consent" form to Woody, but simply told Woody they were seeking his consent. Nor did they state that the law required Woody to consent. The officers allowed Woody an opportunity to consult with an attorney. Finally, the officers gave Woody a copy of A.R.S. § 28-673, which provides in part that it a person refuses a police request to provide urine or blood samples, police may not forcibly obtain the samples, but must honor any refusal and obtain a search warrant. *See* A.R.S. § 28-673(D). Woody appeared to read the statute for a minute, replied "okay," and signed the consent to search form. Initially, Woody agreed to provide a urine and blood sample without any mention of A.R.S. § 28-673, after an unsuccessful attempt to reach his attorney. An officer provided a copy of A.R.S. § 28-673 for Woody's review only because he asked whether his license would be suspended if he refused to give the sample. The statute itself, however, was not invoked.

¶13 Under these circumstances, Woody voluntarily and freely consented to furnish a urine and blood sample, and any injury he might have suffered pursuant to A.R.S. § 28-673(C), had he refused to supply the sample, is purely hypothetical. Because Woody expressly and voluntarily consented to the officers' request that he provide urine and

blood samples, Woody lacks standing to challenge the facial validity of A.R.S. § 28-673 on constitutional grounds. *See Herrera,* 121 Ariz. at 15, 588 P.2d at 308.

¶14 Moreover, even if Woody has standing to challenge the statute simply because he faced a potential threat of license suspension had he refused to furnish a sample, his claim that the statute violates the Fourth Amendment fails.[1] A.R.S. § 28-673 is a "consent" statute, and as such, prohibits the police from seizing a urine or blood sample in the absence of medical purposes or a search warrant if the person refuses to provide the sample. *See* A.R.S. § 28-673(D). The statute relies on the implicit consent of a driver when he obtains his license to the blood draw, and prohibits seizure in the absence of a warrant in the event of a failure to expressly agree at the time of the blood draw. *See* A.R.S. § 28-673(C) and (D). By statute, the officer only may *request* that the driver furnish a urine or blood sample. *See* A.R.S. § 28-673(C) ("the person may be requested to submit to and successfully complete any test. . . ."). If the driver refuses, however, police must advise him that his license will be suspended for twelve months. *Id.* Failure to expressly agree is deemed a refusal, A.R.S. § 28-673(C). Because the statute authorizes seizures only with consent, and does not allow police to rely on implicit consent to forcibly seize the blood, it does not

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[1] Woody has failed to cite any authority that persuades us that Article 2, § 8 of the Arizona Constitution provides any greater protection than the Fourth Amendment under these circumstances, and we thus will not address that claim separately. *See State v. Krantz,* 174 Ariz. 211, 215-16, 848 P.2d 296, 300-01 (App. 1992) (rejecting argument that blood results should have been suppressed under state constitution, noting that state constitutional provision's broader protection has been found only with respect to warrantless searches of homes).

run afoul of the Fourth Amendment. *See Schneckloth,* 412 U.S. at 219 (explaining that a search conducted pursuant to consent is an exception to the requirement of a warrant and probable cause); *State v. Estrada,* 209 Ariz. 287, 290, ¶ 11, 100 P.3d 452, 455 (App. 2004) (noting in dicta that a seizure obtained by explicit or implicit consent complies with the Fourth Amendment, citing A.R.S. §§ 28-673(F) and 28-1321(C)); *Krantz*, 174 Ariz. at 214, 848 P.2d at 299 (noting that pursuant to A.R.S. § 28-1321, "The DUI arrestee is only requested to provide samples and may not be compelled to do so.").[2]

¶15 Mere imposition of the penalty of license suspension for refusal to consent does not rob such consent of its voluntariness. Police invocation of the statutory penalty for, refusal is not similar to a police officer's assertion that he has a warrant, which announces in effect that the occupant has no right to resist the search. *See Bumper v. North Carolina,* 391 U.S. 543, 550 (1968). Arizona's statute is similar to an Indiana implied consent statute held constitutional in the face of a Fourth Amendment challenge because it also does not require police to seize the sample, but simply offers the driver a choice to consent or to refuse and face the penalty. *See Griswold v. State,* 725 N.E.2d 416, 420 (Ind. App. 2000); *cf. South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (describing the choice to submit or refuse to take a blood test under that state's DUI implied consent law as a "difficult" choice not protected by the privilege against self-incrimination). We

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[2] *Campbell v. Superior Court*, 106 Ariz. 542, 554, 479 P.2d 685, 697 (1971) (finding "no merit" to argument that DUI implied consent statute, now A.R.S. § 28-1321, violates Fourth Amendment in light of holding of *Schmerber v. California,* 384 U.S. 757 (1966)).

decline to construe our statute as requiring a blood test in the absence of valid consent, the basis on which other state courts have found their statutes unconstitutional. *See McDuff v. State*, 763 So.2d 850, 853-55 (Miss. 2000) (holding that a statute that provides that every driver of a vehicle involved in accident "shall be tested" violates state and federal Constitutional provisions against unreasonable searches and seizures); *Com. v. Kohl*, 615 A.2d 308, 313 (Pa. 1992) (holding that a statute that "authorizes the search and seizure of an individual's blood" based solely on his involvement in an injury or fatal accident violates state and federal constitutional provisions against unreasonable searches and seizures); *but see King v. Ryan,* 607 N.E.2d 154, 162 (Ill. 1992) (holding that a statute that imposes a license suspension for refusal to furnish a blood sample violates the Fourth Amendment). Because Arizona's statute relies both on the initial implicit consent and the later express agreement of the driver to testing, and specifically provides that a refusal must be honored, the statute does not offend the Fourth Amendment. *See Schneckloth,* 412 U.S. at 219.

¶16 Woody's challenges on grounds of vagueness and overbreadth are also without merit. Woody's argument that the statute gives the officer unlimited discretion, thus permitting discriminatory and arbitrary enforcement, rendering it vague, is belied by the statute's requirement that such tests shall be requested only if a person is involved in a traffic accident resulting in serious injury or death, and if the officer "has probable cause to believe that the person caused the accident" or that person was cited for a traffic violation. *See* A.R.S. § 28-673(A), (B) and (C). Woody's argument that the statute is overbroad similarly

has no merit. Woody fails to offer any authority to support his argument that this statute reaches constitutionally protected conduct, and instead simply cites to the privacy concerns he also raises in his Fourth Amendment claim. By failing to separately argue how the statute is overbroad and to cite to supporting authority, Woody has abandoned this claim. *See State v. Bomar,* 199 Ariz. 472, 479, ¶ 27, 19 P.3d 613, 620 (App. 2001). Moreover, for the same reason that his Fourth Amendment claim fails, this argument also fails.

¶17 For his second issue, Woody argues that the drug recognition evaluation ("DRE") observations and opinions of Officer Karaloff, who was not officially certified to conduct a DRE at the time, were inadmissible for lack of foundation, and pursuant to *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923), due to lack of general acceptance in the scientific community. *See State v. Johnson*, 186 Ariz. 329, 922 P.2d 294 (1996) (holding that *Frye* remains Arizona's rule for the admissibility of scientific evidence).

¶18 Woody filed a pretrial motion to suppress the DRE on the ground that because the officer had not been officially certified to perform the DRE on the date of this evaluation, his testimony lacked the proper foundation. The State argued that the lack of the officer's official certification at the time of Woody's evaluation went to the weight of his opinion and not its admissibility. Following an evidentiary hearing, the judge denied Woody's motion to suppress the DRE results and opinion, finding that at the time of the DRE of Woody, Officer Karaloff had completed all of the training and classes, had passed all of the exams, and was awaiting verification of his twelve evaluations, and although he was not on that date certified, he had since become certified. The trial judge found that

Officer Karaloff was qualified to perform Woody's DRE on that date, and did perform the DRE "in the proper sequence, in the proper manner, and under the eyes of a certified DRE supervisor in conformity with a proper DRE training procedure." He ruled that Officer Karaloff's DRE opinion was therefore admissible, and his lack of certification at the time of the evaluation went to the weight of the opinion and not its admissibility. The judge specifically found that "[t]here is no dispute that DRE is a scientifically accepted procedure."

¶19 We review the trial court's denial of Woody's motion to suppress for an abuse of discretion. *State v. Acinelli*, 191 Ariz. 66, 69, 952 P.2d 304, 307 (App. 1997). We give deference to the trial court's factual findings, but we review the trial court's legal conclusions de novo. *See State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). We may affirm on any basis supported by the record. *State v. Robinson,* 153 Ariz. 191, 199, 735 P.2d 801, 809 (1987). We review the facts in the light most favorable to sustaining the trial court's ruling. *State v. Hyde,* 186 Ariz. 252, 265, 921 P.2d 655, 668 (App. 1996). "We restrict our review to consideration of the facts the trial court heard at the [hearing on the motion]." *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996).

¶20 A DRE is conducted to determine if the driver is impaired by drugs, and if so, which category. The DRE consists of twelve steps as follows: 1) conducting a breath test; 2) interviewing the arresting officer; 3) preliminary examination and questioning of the suspect; 4) performing an eye examination, including horizontal and vertical gaze nystagmus test, and lack of convergence test; 5) testing divided attention by conducting standard validated field sobriety tests; 6) testing vital signs, specifically blood

pressure, temperature, and second pulse rate; 7) examining suspect using a pupilometer to measure suspect's pupil size in different lighting conditions; 8) checking muscle tone; 9) checking for injection sites; 10) questioning suspect about drug use; 11) giving opinion on what drugs suspect is under the influence of; and 12) submitting urine or blood sample to toxicologist for confirmation.

¶21 Officer Karaloff conducted a DRE of Woody on May 16, 2003, under the supervision of certified DRE instructor Officer Coulter, but before Officer Karaloff received his official certification as a drug recognition expert. To become a certified drug recognition evaluator, Officer Karaloff made about one hundred arrests for driving under the influence, and was required to obtain certification to conduct the horizontal gaze nystagmus test; to attend two weeks of classroom training in drug recognition; to score eighty percent or higher on a written examination; to complete twelve drug recognition evaluations, nine of which must be confirmed by the toxicology test; and to complete another final test. Before conducting the DRE on Woody, Officer Karaloff had completed all of the substantive steps necessary to obtain his certification, including the classroom training, the twelve field drug recognition evaluations under the supervision of a certified instructor, and the final examination. He received official certification from the International Chiefs of Police to conduct the DRE dated July 1, 2003, about forty-five days after this evaluation. The State DRE coordinator, however, testified that he considered Officer Karaloff officially certified on May 22, 2003, when his paperwork was submitted for certification, less than a week after Woody's DRE.

¶22 Officer Coulter monitored Officer Karaloff's DRE of Woody, and signed an evaluation confirming that he had performed the DRE properly. Officer Coulter testified, contrary to Woody's claim, that he was present during all twelve steps of the DRE. Officer Coulter testified that he would not give a DRE opinion if he did not actually conduct the DRE himself, but in this case, he supported Officer Karaloff's opinion, based on his own observations while the DRE was conducted.

¶23 The trial court did not abuse its discretion in ruling that Officer Karaloff's testimony was admissible over Woody's objection that because Officer Karaloff was not certified, his opinion lacked the necessary foundation. Rule 702 of the Arizona Rules of Evidence permits a witness "qualified as an expert by knowledge, skill, experience, training, or education" to offer an opinion if his specialized knowledge will assist the trier of fact. Ariz. R. Evid. 702. The proper foundation for administering a DRE test includes a description of the officer's training, education, and experience in administering the test, along with a showing that the test was properly administered. *See State ex rel. Hamilton v. City Court*, 165 Ariz. 514, 519, 799 P.2d 855, 860 (1990) (holding that such evidence is a proper foundation for admission of horizontal gaze nystagmus test results); *cf. State v. Superior Court (Blake)*, 149 Ariz. 269, 276, 718 P.2d 171, 178 (1986) (suggesting that horizontal gaze nystagmus test results are reliable only when administered by trained and certified officers).

¶24 Officer Karaloff testified that prior to this DRE, he had completed the course work, which he described, the examinations, and all of the evaluations necessary to receive the national certification to perform DREs. He received the paperwork necessary to obtain the certification within a

week of this DRE, and subsequently received the certification based on completion of the necessary training and examinations before this DRE. Moreover, Officer Coulter, a certified DRE instructor, testified that Officer Karaloff properly administered the DRE, under his supervision, and he supported Officer Karaloff's opinion based on his own observations. Under those circumstances, we have held the necessary foundation has been supplied for the in-training officer's opinion. *See Harris v. Schmitt,* 180 Ariz. 560, 561-62, 885 P.2d 1125, 1126-27 (App. 1994) (holding that in-training DRE officer's conclusion was admissible in an administrative hearing, in which the officer "testified about his prior experience and his supervisor was present and concurred in his assessment.").

¶25 On this record, where Officer Karaloff had completed all of the substantive certification requirements prior to this DRE, and he was supervised by a certified DRE instructor who concurred in his DRE opinion, the trial court did not abuse its discretion in finding that Officer Karaloff was qualified to offer his opinion on the DRE he conducted of Woody.

¶26 Woody failed to object below on grounds the testimony was inadmissible under *Frye*, and we therefore review for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* Woody "bears the burden of establishing both that fundamental error occurred and that the error caused him prejudice." *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶27 We find no error, much less fundamental error in admission of Officer Karaloff's DRE results and opinion over this objection. The trial court found that "[t]here is no dispute that the DRE is a scientifically accepted procedure," and Woody offers no citation to any portion of the record or any authority that would suggest that the DRE itself is "new, novel, or experimental scientific evidence," or not generally accepted in the relevant scientific community, and thus subject to evaluation under *Frye*. *See State v. Lucero,* 207 Ariz. 301, 303, ¶ 9, 85 P.3d 1059, 1061 (App. 2004) ("*Frye* determination is required only for new, novel or experimental scientific evidence"); *State v. Harris,* 152 Ariz. 150, 152, 730 P.2d 859, 861 (App. 1986) (party is entitled to *Frye* hearing only if "supported by authorities indicating that there may not be general scientific acceptance of the technique employed."). To the extent that Woody argues that the scientific acceptability of Officer Karaloff's opinion was undermined by the absence of official notice that he was certified, Woody's claim has no merit. The absence of official certification, under the circumstances here, goes to the weight, and not to the admissibility, of his opinion. *See Harris,* 180 Ariz. at 561-62, 885 P.2d at 1126-27. On the same authority, we also find no merit in Woody's argument for the first time on appeal that the unfair prejudice resulting from the absence of certification substantially outweighed the relevance of the evidence. *See id.*

CONCLUSION

¶28 For the foregoing reasons, we affirm Woody's conviction and sentence.

/s/ Patrick Irvine
PATRICK IRVINE,
Presiding Judge

CONCURRING:

/s/ Lawrence F. Winthrop
LAWRENCE F. WINTHROP, Judge

/s/ James B. Sult
JAMES B. SULT, Judge

APPENDIX B

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2003-021776-001 DT — 10/25/2004

HONORABLE
WARREN J. GRANVILLE

CLERK OF THE COURT
E. Crowden
Deputy

FILED: 10/29/2004

STATE OF ARIZONA — JENNIFER E GREEN

v.

KEVIN CLAY WOODY (001) — DAVID M CANTOR
TODD E NOLAN

RULING

The Court took under advisement Defendant's motion to suppress DRE results and to dismiss ARS 28-673 as unconstitutional. The Court has considered the parties' pleadings, the witness' testimony, the cases cited, and makes the following findings and ruling:

On May 16, 2003, police responded to a call that a vehicle had run a stop sign and seriously injured a 13-year-old boy who had been walking in a marked cross walk.

Police had determined that Defendant was the driver, and they approached him. Defendant was cooperative and agreed to answer questions. He also agreed to accompany police to the station for a drug recognition examination.

The police officers doing the follow up did not believe they had probable cause to arrest Defendant at the time that he agreed to come to the police station and participate in the drug recognition examination.

A drug recognition examination is a regimented sequence of 12 tests aimed at determining whether a subject is under the influence of drugs. The program is nationally recognized and accepted. A state agency has been established to set a protocol to certify officers who qualify in performing the drug recognition examination and rendering an opinion based upon the evaluation.

In order to attempt to be DRE certified, a police officer must have qualifications beyond those met by a certified peace officer. An DRE certified applicant must be HGN certified, must take a 2 day class, followed by 5 day class, must take and pass two exams. and must perform 12 DRE evaluations under the auspices of a certified DRE certified Instructor where the results are further verified by toxicology exams to be accurate at least 75% of the time.

Officer Karaloff was an applicant for DRE certification on May 16, 2003. By May 16, 2003, he had completed all of the training and classes, had passed all of the exams, and was awaiting verification of his 12 evaluations. His application for DRE certification was completed on May 23, 2003, and he received the state agency's certification on July 1, 2003.

On May 16, 2003, Officer Karaloff performed the drug recognition examination of Defendant. Per DRE procedures, a DRE certified supervisor, Officer Coulter, monitored Officer Karaloff's evaluation.

Officer Karaloff performed each of the regimented sequence of tests in the correct order and manner.

Officer Coulter was present to witness the entire DRE. He was able to make the same observations as Officer Karaloff for parts of the evaluation – field sobriety

tests, HGN, pupil sizing. He was able only to record other tests – pulse, blood pressure, and temperature.

After completing the DRE, Officer Karaloff opined that Defendant was under influence of drugs,

During the evaluation, Officer Karaloff asked Defendant if he would permit the taking of a blood and urine sample. Defendant asked if he could call an attorney. His request was granted. Defendant was able to make a call, but was unable to reach his attorney.

After his phone call, Defendant asked the officers what would happen to his license if he refused to provide his fluid samples. In response, Officer Karaloff gave Defendant a copy of ARS 28-673. Defendant appeared to have read the statute, then cooperated in giving samples of his blood and urine. Toxicology later determined the presence of stimulant and cannabis.

Before giving Defendant a copy of ARS 28-673, Officer Coulter had called Mitch Rand, a County Attorney who specializes in vehicular and criminal law. It was Mr. Rand who had advised Officer Coulter to give Defendant a copy of ARS 28-673.

The relevant portions of ARS 28.673 (A):

A person who operates a motor vehicle within this state gives consent to a test or tests of person's blood or urine for the purposes of determining drug content if the person is involved in a traffic accident resulting in death or serious physical injury, and a law enforcement officer has probable cause to believe that the person caused the accident.

ARS 28-673(C) states, that if a test is requested pursuant to 28-673(A), and the driver refuses to provide the sample requested, then the police are to inform the driver that his license would be suspended for twelve months.

Police never expressly invoked 28-376(C) because Defendant agreed to provide samples after being given a copy of the statute.

Defendant asks this Court to declare ARS 28-673 unconstitutional because it authorizes searches without probable cause to believe the driver was impaired.

Defendant's claim is belied by the language of the statute, which expressly mandates probable cause to believe the driver caused the accident. This Court finds the probable cause requirement reasonable under the Sixth Amendment and Article 2 Section 8 of the Arizona Constitution.

Further, this Court finds that ARS 25-673(C) was never triggered.

Officer Coulter did not believe he had probable cause and stated that he gave Defendant a copy of the statute upon advice of the County Attorney. Officer Coulter never advised Defendant that he had to consent to provide a fluid sample or face suspension of his license. He testified he didn't know what he would have done if Defendant had declined to provide a sample.

The law does not require police to advise a subject being asked for consent that they have a right to refuse consent. The law does not preclude trickery to induce consent.

Defendant consented to provide a sample of his blood and urine.

Alternatively, this Court finds that there was probable cause to believe that Defendant had caused the accident. At the time, the facts showed that Defendant had driven through a stop sign and hit a pedestrian in a marked crosswalk. Probable cause is objective, and so the subjective belief of Officer Coulter is immaterial.

Finally, this Court finds that the officers' actions of seeking and following the advice of a prosecutor who specialized in this field of law rendered the seizures of the samples in good faith.

Defendant seeks to suppress Officer Karaloff's DRE report because he was not a certified DRE at the time he performed the evaluation.

There is no dispute that DRE is a scientifically accepted procedure. There is no dispute that Officer Karaloff was not a certified DRE examiner at the time of the examination. There is no dispute that Officer Karaloff is a certified DRE examiner at the time of trial.

The Court finds that, on May 16, 2003, Officer Karaloff was qualified to perform a DRE, that the evaluation he performed was in the proper sequence, in the proper manner, and under the eyes of a certified DRE supervisor in conformity with a proper DRE training procedure.

The Court finds that Officer Karaloff is now a certified DRE officer and may render an opinion pursuant to his drug recognition evaluation. The Court finds that Officer Karaloff s lack of "board certification" at the time of the evaluation goes to the weight of his opinion, not its admissibility.

IT IS ORDERED denying Defendant's motion to suppress his blood and urine samples.

IT IS FURTHER ORDERED denying Defendant's motion to declare ARE 28-673 unconstitutional.

APPENDIX C

[SEAL]

Supreme Court
STATE OF ARIZONA

NOEL K. DESSAINT
CLERK OF THE COURT

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

November 29, 2006

RE: STATE OF ARIZONA v KEVIN CLAY WOODY
Arizona Supreme Court No. CR-06-0232-PR
Court of Appeals Division One No. 1 CA-CR 05-0412
Maricopa County Superior Court
No. CR2003-021776-001 DT

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 28, 2006, in regard to the above-referenced cause:

ORDERED: Petition for Review by the Supreme Court is DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 29th day of November, 2006.

Noel K Dessaint, Clerk

TO:
Hon. Terry Goddard, Arizona Attorney General
Attn: Randall M Howe and Cassie Bray Woo
David M Cantor and Todd B Nolan, Law Office of
David Michael Cantor PC
Kevin Clay Woody, ADOC 193597, Arizona State Prison,
Lewis – Buckley Unit

West Publishing Company
Lexis-Nexis
Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix
sdt

APPENDIX D

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Attorneys for Defendant

IN THE MARICOPA COUNTY SUPERIOR COURT
IN AND FOR THE STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff, v. KEVIN WOODY, Defendant.	No. CR2003-021776-001 DT **MOTION TO DISMISS A.R.S. §28-673 AS UNCONSTITUTIONAL** (Assigned to Hon. Warren Granville) **Evidentiary Hearing Requested**

Defendant, Kevin Woody, by and through undersigned counsel, under Article 2, §8 of the Arizona Constitution and the Fourth and Fourteenth Amendments to the United States Constitution, moves this Court to dismiss A.R.S. §28-673 as unconstitutional for the following reasons:

1. A.R.S. §28-673 unreasonably authorizes chemical testing of drivers that cause accidents resulting in death or serious physical injury to determine alcohol concentration or drug content without the slightest indication the driver was impaired by alcohol or drugs.

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

C. A.R.S. §28-673 Violates the Fourth and Fourteenth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. This prohibition indicates an individual's legitimate and reasonable expectation of privacy by requiring that searches and seizures be predicated upon probable cause.

> The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

Probable cause means evidence beyond a bare suspicion which would lead a reasonable person to believe that an offense has been or is being committed. *Brinegar v. U.S.*, 338 U.S. 160, 165, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

The United States Supreme Court has resolved the removal of blood constitutes a search within the meaning of the Fourth Amendment. *Schmerber v. California,* 384 U.S. 757 (1966). Intrusions into the body are permitted by the Fourth Amendment only if they are conducted pursuant to a warrant, or if exigent circumstances exist and there is a clear indication that the desired evidence will be found. Privacy and human dignity interests protected by the Fourth Amendment forbid intrusions into the body on the mere chance that evidence may be discovered.

Schmerber, 384 U.S. at 769-70. The chemical test authorized by A.R.S. §28-673, without probable cause or a warrant, fails to meet the probable cause standard set forth by the Supreme Court in *Schmerber.*

In *Schmerber,* following an accident involving an automobile driven by Petitioner, a police officer smelled liquor on Petitioner's breath and noticed other symptoms of impairment at the accident scene. Within two hours of the accident, the officer again saw Petitioner at the hospital. The officer noticed similar symptoms of impairment. The officer arrested Petitioner and directed a physician to draw a sample of Petitioner's blood. Considering these facts, the Court noted there was "plainly probable cause" for police to suspect Petitioner of DUI. By predicating its holding on a finding of probable cause to arrest Petitioner for DUI, the Court recognized, "[t]he integrity of an individual's person is a cherished value of our society . . . " and concluded "that we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under *stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under any circumstances." Schmerber,* 384 U.S. at 772.

A.R.S. §28-673 authorizes a search for impairment evidence *without* probable cause to believe the driver to be tested is impaired. The statute, likewise, does not present a *Skinner* "special needs" exception as set forth below. Under the Arizona Constitution, this Court must, therefore, declare A.R.S. §28-673 unconstitutional.

* * *

APPENDIX E

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee,	) Court of Appeals) Division One) No. 1 CA-CR 05-0412
v.	)
KEVIN WOODY, Appellant.	)) Maricopa County Superior Court) No. CR2003-021776-001 DT

APPELLANT'S OPENING BRIEF

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Attorneys for Appellant

* * *

C. ARS §28-673 Violates the Fourth and Fourteenth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. This prohibition indicates an individual's legitimate and reasonable expectation of privacy by requiring that searches and seizures be predicated upon probable cause.

> The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

Probable cause means evidence beyond a bare suspicion which would lead a reasonable person to believe that an offense has been or is being committed. *Brinegar v. U.S.,* 338 U.S. 160, 165, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

The United States Supreme Court has resolved the removal of blood constitutes a search within the meaning of the Fourth Amendment. *Schmerber v. California,* 384 U.S. 757 (1966). Intrusions into the body are permitted by the Fourth Amendment only if they are conducted pursuant to a warrant, or if exigent circumstances exist and there is a clear indication that the desired evidence will be found. Privacy and human dignity interests protected by the Fourth Amendment forbid intrusions into the body on the mere chance that evidence may be discovered. *Schmerber,* 384 U.S. at 769-70. The chemical test authorized by ARS §28-673, without probable cause or a warrant, fails to meet the probable cause standard set forth by the Supreme Court in *Schmerber.*

In *Schmerber,* following an accident involving an automobile driven by Petitioner, a police officer smelled liquor on Petitioner's breath and noticed other symptoms of impairment at the accident scene. Within two hours of the accident, the officer again saw Petitioner at the hospital. The officer noticed similar symptoms of impairment. The officer arrested Petitioner and directed a physician to draw a sample of Petitioner's blood. Considering these

facts, the Court noted there was "plainly probable cause" for police to suspect Petitioner of DUI. By predicating its holding on a finding of probable cause to arrest Petitioner for DUI, the Court recognized "[t]he integrity of an individual's person is a cherished value of our society . . . " and concluded "that we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under *stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under any circumstances." Schmerber,* 384 U.S. at 772.

ARS §28-673 authorizes a search for impairment evidence *without* probable cause to believe the driver to be tested is *impaired.* The statute, likewise, does not present a *Skinner* "special needs" exception as set forth below. Under the Arizona Constitution, this Court must, therefore, declare ARS §28-673 unconstitutional.

* * *

APPENDIX F

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, v. KEVIN WOODY, Appellant.	) Court of Appeals) Division One) No. 1 CA-CR 05-0412))) Maricopa County Superior Court) No. CR2003-021776-001 DT

APPELLANT'S REPLY BRIEF

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* * *

IV. Appellant's Consent to Submit to a Chemical Test of His Blood Was Not Free and Voluntary

Pursuant to the Fourth and Fourteenth Amendments of the United States Constitution and Article 2, Section 8 of the Arizona Constitution, should the Court reach the issue, Appellant did not voluntarily consent to blood and urine tests.

First and foremost, where the State seeks to justify a warrantless search on the ground of consent, it "has the burden of proving that the consent was, in fact, freely and

voluntarily given." *Bumper v. North Carolina,* 391 U.S. 543 (1968). The question presented in *Bumper* was whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses lawful authority to do so. In concluding, there can be no consent under such circumstances, the Court recognized:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. **This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.** The Court reasoned that a search conducted in reliance upon a search warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.

(Emphasis added). *Id.* at 548. Thus, the *Bumper* Court made clear that consent cannot exist where a law enforcement officer asserts authority to obtain a sample of blood, breath, or urine.

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion – albeit colorable lawful coercion. Where there is coercion, there cannot be consent.

Id. at 550.

Indeed, the United States Supreme Court has long held that a law enforcement officer's assertion of authority to conduct a search vitiates consent. *See Johnson v. United States,* 333 U.S. 10 (1948) (search not voluntary where a police officer knocked on the door, identified himself, and said "I want to talk to you a little bit"); *Amos v. United States,* 255 U.S. 313 (1921) (search not voluntary where law enforcement officers identified themselves and told the occupant that they "had come to search the premises").

In *Schneckloth v. Bustamonte,* the United States Supreme Court further clarified the standard for determining whether a consent is voluntary under the Fourth Amendment. The Court stated:

> When the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, expressed or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Where, as here, an officer represents to an accused that he has statutory authority to search and it results in acquiescence by the accused, then the search is invalid. *State v. Hall,* 229 GA App. 194 (1997); *Payne v. State,* 244 GA App. 734 (2000). A person's obedience to a show of authority is by itself insufficient to establish voluntary consent to search. *United States v. Chan-Jimenez,* 125 F.3d

1324 (9th Circuit 1997). The Government must show that consent was unequivocal and specific and freely and intelligently given. *Id.* Here, Appellee failed to raise the issue in the Trial Court and cannot satisfy its "burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper,* 391 U.S. 543 (1968).

* * *

APPENDIX G

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Respondent, v. KEVIN WOODY, Petitioner.	) Court of Appeals) Division One) No. 1 CA-CR 05-0412))) Maricopa County Superior Court) No. CR2003-021776-001 DT

PETITION FOR REVIEW

BY THE SUPREME COURT

LAW OFFICES OF
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Attorneys for Petitioner

* * *

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

I. ARS §28-673 VIOLATES ARTICLE 2 SECTION 8 OF THE ARIZONA CONSTITUTION AND THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY UNREASONABLY AUTHORIZING CHEMICAL TESTING OF DRIVERS FOR EVIDENCE OF IMPAIRMENT WITHOUT THE SLIGHTEST INDICATION THE DRIVER IS IMPAIRED BY ALCOHOL OR DRUGS.

* * *

B. A.R.S. §28-673 Violates the Fourth and Fourteenth Amendments to the United States Constitution and Article 2 §8 of the Arizona Constitution.

The Fourth and Fourteenth Amendment to the United States Constitution and Article 2 §8 of the Arizona Constitution prohibit unreasonable searches and seizures. This prohibition vindicates an individual's legitimate and reasonable expectation of privacy by requiring that searches and seizures be predicated upon probable cause. U.S. Const., Amend. IV. Probable cause means evidence beyond a bare suspicion which would lead a reasonable person to believe that an offense has been or is being committed. *Brinegar v. U.S.*, 338 U.S. 160, 165, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

The United States Supreme Court has resolved the removal of blood constitutes a search within the meaning of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757 (1966). Intrusions into the body are permitted by the Fourth Amendment only if they are conducted pursuant to a warrant, or if exigent circumstances exist and

there is a clear indication that the desired evidence will be found. Privacy and human dignity interests protected by the Fourth Amendment forbid intrusions into the body on the mere chance that evidence may be discovered. *Schmerber,* 384 U.S. at 769-70.

The chemical test authorized by ARS §28-673, without probable cause or a warrant, fails to meet the probable cause standard set forth by the Supreme Court in *Schmerber.* ARS §28-673 authorizes a search for impairment evidence *without* probable cause to believe the driver to be tested is *impaired.*

* * *

D. Petitioner's Consent to Submit to a Chemical Test of His Blood Was Not Free and Voluntary.

Pursuant to the Fourth and Fourteenth Amendments of the United States Constitution and Article 2, Section 8 of the Arizona Constitution, should the Court reach the issue, Petitioner did not voluntarily consent to blood and urine tests.

First and foremost, where the State seeks to justify a warrantless search on the ground of consent, it "has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina,* 391 U.S. 543 (1968). The question presented in *Bumper* was whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses lawful authority to do so. In concluding, there can be no consent under such circumstances, the Court recognized:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the

> burden of proving that the consent was, in fact, freely and voluntarily given. **This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.** The Court reasoned that a search conducted in reliance upon a search warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.

(Emphasis added). *Id.* at 548. Thus, the *Bumper* Court made clear that consent cannot exist where a law enforcement officer asserts authority to obtain a sample of blood, breath, or urine.

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion – albeit colorable lawful coercion. Where there is coercion, there cannot be consent.

Id. at 550.

Indeed, the United States Supreme Court has long held that a law enforcement officer's assertion of authority to conduct a search vitiates consent. *See Johnson v. United States,* 333 U.S. 10 (1948) (search not voluntary where a police officer knocked on the door, identified himself, and said "I want to talk to you a little bit"); *Amos v. United*

States, 255 U.S. 313 (1921) (search not voluntary where law enforcement officers identified themselves and told the occupant that they "had come to search the premises").

In *Schneckloth v. Bustamonte,* the United States Supreme Court further clarified the standard for determining whether a consent is voluntary under the Fourth Amendment. The Court stated:

> When the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, expressed or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Where, as here, an officer represents to an accused that he has statutory authority to search and it results in acquiescence by the accused, then the search is invalid. *State v. Hall,* 229 GA App. 194 (1997); *Payne v. State,* 244 GA App. 734 (2000). A person's obedience to a show of authority is by itself insufficient to establish voluntary consent to search. *United States v. Chan-Jimenez,* 125 F.3d 1324 (9th Circuit 1997). The Government must show that consent was unequivocal, specific, freely and intelligently given. *Id.* Here, Appellee failed to raise the issue in the

Trial Court and cannot satisfy its "burden of proving that the consent was, in fact, freely and voluntarily given."

Bumper, 391 U.S. 543 (1968).

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